No. 5485

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

S. S. MILLARD,

Appellant,

vs.

WILLIAM I. TRAEGER, Sheriff of the County of Los Angeles, State of California,

Appellee.

BRIEF OF APPELLEE.

ASA KEYES,
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FILED

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BRIEF OF APPELLEE.

STATEMENT OF FACTS.

On the 17th day of April, 1928, one George D. Collins filed in the United States District Court in and for the Southern District of California, Southern Division, Honorable William P. James, Judge, a petition for a Writ of Habeas Corpus on behalf of the above-named appellant, S. S. Millard. The petition was not verified by said Millard, but was verified by said Collins, who stated as the reason why said Millard did not make and verify the petition that he was imprisoned in the County Jail of

the County of Los Angeles, State of California, and for that reason was unable to do so; that the necessary delay in an attempt to have him do so might entail his possible removal beyond the jurisdiction of the court before he could sign and verify the petition. (R., p. 1.)

The petition further alleges that Millard was imprisoned and restrained of his liberty by the Appellee, William I. Traeger, Sheriff of said County of Los Angeles, and in the County Jail in the City of Los Angeles, in said County, under and by virtue of certain void interstate rendition proceedings, and by the alleged authority of a void warrant of rendition, heretofore issued by the Governor of the State of California on requisition of the Governor of the State of Illinois, and against said Millard.

Various grounds were alleged for the claim that said imprisonment of said Millard was illegal and in violation of the Constitution and Laws of the United States. Briefly stated, these grounds are as follows: Substantially the same grounds as those set forth in his assignments of alleged error.

1. That the accusatory affidavit on which the rendition proceeding was based did not charge the said Millard with treason, felony, or other crime, and was not on file in any court at the time of the issuing of the requisition.

2. That Millard did not flee from justice in the State of Illinois, nor take refuge in the State of California, and was not a fugitive from justice, and committed no crime in the State of Illinois.

3. That no accusatory affidavit was made before a magistrate of the State of Illinois, charging said Millard with having committed treason, felony, or other crime; that the only accusatory affidavit was one made before one of the Judges of the Municipal Court of Chicago, and that said Judge of said Municipal Court of Chicago is not a magistrate, and that he is denied by the laws of Illinois the power to issue a warrant of arrest.

4. That the interstate rendition proceeding had been issued in bad faith, and had been executed by one Leon E. Goetz, the accuser of said Millard, solely for the purpose of extorting on behalf of himself and the U. S. Health Films, Incorporated, a corporation, and from said Millard by means of said accusation, certain property, consisting of negatives and prints of certain moving pictures, which were the subject of a civil suit in the State of Illinois, then pending between said Millard and said Goetz. (R., pp. 1–3.)

A Writ of Habeas Corpus was granted and issued by said United States District Court and, on the return day of said Writ, an Answer and Return thereto was filed by the said William I. Traeger, such Sheriff, in which he admitted that said Millard was in his custody as such Sheriff, and alleged that he held him in such custody by virtue of a Warrant issued out of the Municipal Court of the City of Los Angeles, a copy of which was attached to the Answer and Return and made a part thereof, charging said Millard with being a fugitive from the justice of the State of Illinois, and also by virtue

of a Rendition Warrant issued by the Governor of the State of California, after a full hearing on the merits for the rendition of said Millard to the State Agent of the State of Illinois for the crime of felony in having fraudulently obtained from the U. S. Health Films, Incorporated, the sum of Twenty-five Thousand Dollars ($25,000.00), in money of the United States of America, by the means and use of the "confidence game," as more fully appeared by said Rendition Warrant, a copy of which was attached to the said Answer and Return and made a part thereof. (Rendition Warrant, R., p. 17.)

The Answer and Return further alleged that, prior to the issue and service upon said Sheriff of the Writ of Habeas Corpus in this proceeding, a Writ of Habeas Corpus had been obtained by Millard from the Superior Court of the State of California, which Writ was in full effect and force and was pending at the time the petition for this Writ was verified and presented to the United States District Court. The Sheriff therefore prayed that the Writ be dismissed and the said Millard be remanded to the custody of the State Agent of the State of Illinois, as provided by the Rendition Warrant of the Governor of the State of California. (R., p. 11.)

The Petitioner, George D. Collins, thereupon filed an Answer, or Traverse, to said Return to said Writ of Habeas Corpus, in which he attempted to put in issue the allegation of the Return that a similar habeas corpus proceeding was pending in the State Court, by alleging that the petition for the Writ of

Habeas Corpus in the Superior Court of Los Angeles County and the Writ issued thereof had no reference or relation whatever to the custody or imprisonment of the said S. S. Millard by the said sheriff of said County of Los Angeles, but, on the contrary, had reference entirely to another and entirely different custody and entirely different restraint of liberty, not involved in the petition filed herein in the United States District Court, etc., the Answer and Traverse further, in substance, reiterated the allegations of the petition in this proceeding as to the complaint and warrant in the Municipal Court of the City of Chicago and as to the claim that the crime of "confidence game" was not a public offense. (R., pp. 19–28.)

Thereafter this proceeding came on for a hearing before said United States District Court, Honorable William P. James presiding, and the original Warrant of Rendition issued by the Governor of the State of California was produced, read and offered in evidence, and also a certified copy of the extradition papers upon which the Governor of the State of California acted in issuing said Warrant. (R., pp. 31–46.) As no attack is made upon the sufficiency of these papers, except on the ground that the complaint does not state a public offense, and on the ground that it was not sworn to before a magistrate, as required by the provisions of the U. S. Revised Statutes regulating extradition, which grounds will be fully considered below in this brief, such papers need not be recited here, any further than to state that they are in the usual form required by the rules for interstate extradition proceedings which

have been adopted and followed by the Governors of various states, including the State of Illinois and the State of California.

The prisoner, S. S. Millard, also known as Elid Stanich, was then sworn as a witness in his own behalf, and he was asked the question: "Did you, on or about the 4th day of November, 1927, obtain from the U. S. Health Films, Inc., an Illinois corporation, the sum of $25,000?" This was objected to by counsel for the Appellee-Sheriff, on the following ground: (See R., pp. 46-51.)

> "Mr. Becker: I object to that on the ground that it is not a question that can be litigated in this proceeding or put in issue; that the rendition warrant of the Governor of the State of California which has already been offered in evidence here by the petitioner himself, and also set up in the return and referred to in the petition, forecloses any such inquiry; that it is presumed that the magistrate who issued the warrant acted advisedly and on probable cause. The papers are all certified to as authentic by the Governor and that question is not open to inquiry here in this proceeding."

The District Court then ruled as follows, addressing counsel for the prisoner:

> "For your record perhaps you had better state what you propose to show by the witness, so the record may be clear as to what is to follow.
>
> "Mr. Morris, counsel for prisoner: I propose to show by this witness the transaction upon

which this warrant is based is purely and simply a civil matter.

"By the Court: It is well that you now make your complete offer so we may have the offer. Let the record show specifically what you expect to prove.

"Mr. Morris: We offer to prove, if the court please, that the accused, S. S. Millard, is not a fugitive from justice and in that behalf to show by sufficient evidence that on the 4th day of November, 1927, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, and as a loan by the corporation to him the sum of twenty-five thousand dollars, for which he executed his two certain promissory notes not yet matured, one in the sum of fifteen thousand dollars and one in the sum of ten thousand dollars, fully secured by transfer to the corporation of property exceeding in value the amount loaned him. We propose to show that it is this perfectly legitimate business transaction, that is wrongly, maliciously and wantonly and for purpose solely of private revenge made the exclusive and only basis of the charge, the altogether false charge on which these extradition, or more accurately, these interstate rendition proceedings are based, in fraud and perversion of the Constitution and laws of the United States. We propose further to prove that the very matters connected with the making of the loan and the

written contracts out of which the transaction was had between the parties, and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United States District Court, Northern District of Illinois, Eastern Division, being case No. 8000 in that court and still pending there awaiting trial in due course, and we will prove if permitted, that this suit was brought long prior to the accusation which is made the basis of these interstate rendition proceedings. We will show that according to the decisions of the Supreme Court of Illinois, (citing authorities) the transaction in and by which Millard obtained the loan of twenty-five thousand dollars, was and is a perfectly legitimate business transaction, no confidence game and does not constitute under the laws of Illinois a confidence game, nor the obtaining of money by the use or means of what is commonly known as a confidence game. On the facts stated and which we here offer to prove in this habeas corpus case we will thereby show to this court that Millard is not a fugitive from justice. That we have the legal right to prove the facts stated for this purpose, we cite to the court the following authorities, (citing authorities):

"Our purpose is not to bring to trial in this habeas corpus case any issue or question of guilt or innocence but to show that no such issue and no such question is possible and that

the accusation itself is false and fraudulent, that it is without reasonable or probable cause and is in fraud and perversion of the Constitution and laws of the United States relative to interstate rendition and that the accused is not a fugitive from justice."

"By Mr. Becker, counsel for Respondent-Sheriff: It is understood, I believe, by this offer—to make it perfectly clear on the record—that the Petitioner is not offering to testify or prove that he was not actually in the State of Illinois at the times charged in the complaint and warrant involved in this proceeding, but simply because, as he did not commit any offense and therefore he is not a fugitive. Am I correct?

"By Mr. Morris, counsel for Petitioner: Yes.

"By Mr. Becker: I renew my objections to the offer on the same grounds heretofore stated. It is not a permissible subject for inquiry in this proceeding. That matter must be tried out in the State courts of Illinois after the Petitioner is brought there to answer. It is not a subject of inquiry here."

"The Court: I will sustain the objection. To which ruling the petitioner and the said S. S. Millard then and there duly excepted."

The Petitioner then rested his case.

To meet the proposition that the complaint and accusation had been properly sworn to and warrant issued by a court of competent jurisdiction and a magistrate thereof, counsel for the Respondent-

Sheriff offered in evidence, and the court received in evidence, Section 389, of Chapter 37 of the Criminal Code of the State of Illinois, which reads as follows:

> "There shall be established in and for the City of Chicago, a Municipal Court, which shall be a court of record and shall be styled a Municipal Court of Chicago";

also Section 390 of said Chapter 37 of said Code, which reads as follows:

> "The Municipal Court shall have jurisdiction in the following cases: * * * cases to be designated and hereinafter referred to as cases of the sixth class, which shall include (b) all proceedings for the arrest, examination, commitment and bail, of persons charged with criminal offenses";

also Section 442 of said Chapter 37 of said Code, which reads as follows:

> "The practise and all proceedings in the Municipal Court for the arrest, examination, commitment and bail, of persons charged with criminal offenses shall be the same as near as may be as provided by law for similar proceedings before justices of courts of record and justices of the peace, with the following exceptions: 1. The complaint shall be filed with the Clerk of the Municipal Court, who, when ordered by the court, shall issue a warrant, etc."
>
> (R., pp. 50–52.)

The case was then closed, and the District Court granted an order discharging and dismissing said

Writ of Habeas Corpus herein, and remanding the prisoner to the custody of the Respondent-Sheriff. From this order the appellant, Millard, has appealed to this court, a bill of exceptions has been duly settled by the Judge of the United States District Court, and this case is now here for determination on said appeal.

POINT I.

Sections 1282 and 1283 of the Judicial Code of the United States make an absolute requirement that the petition in habeas corpus proceedings must be made and verified by the person restrained of his liberty in person. The petition in this case is made and verified by one George D. Collins, and not by the Petitioner, and, for this reason, it was properly denied and the prisoner remanded.

The only excuse for its having been made and verified by Collins, and not by the prisoner, stated therein is, that the prisoner was in jail, and for that reason was unable to do so, and that the necessary delay in an attempt to have him do so might entail his possible removal beyond the jurisdiction of the court before he could sign and verify the petition.

It is respectfully submitted that this is no excuse at all, and no reason for not complying with the express requirements of the Judicial Code. No claim is made that Collins or the prisoner had applied to the proper authorities that Millard be permitted to make and verify the petition in jail, and it is absurd to suppose that, if any such application was made, it would have been refused.

We understand that this question is now before this Court in Case No. 5415, Virgil Adair, Appellant, vs. E. B. Benn, U. S. Marshal for the Western District of Washington, Appellee, upon appeal from the United States District Court for the Western District of Washington, Southern Division, in which the case of Ex parte Hibbs, 26 Fed. 421, 435, is cited by counsel for Appellee Benn.

POINT II.

The Return of the Appellee-Sheriff alleges that a Writ of Habeas Corpus had been obtained in the Superior Court of the State of California, in and for Los Angeles County, and was then pending at the time of the filing of the petition herein in the United States District Court. The Answer, or Traverse, of the Petitioner Collins, when analyzed carefully, does not deny that such a proceeding was pending in the State Court on the 17th day of April, 1921. It simply alleges that the custody and restraint of liberty involved in the petition filed in the said Superior Court "was not involved in the petition herein in said United States District Court, nor involved in the Writ of Habeas Corpus issued by said Court." The Answer, in effect and in terms, admits that some such petition had been filed and a writ issued by said Superior Court.

We respectfully submit that this is no denial at all, and it does not reach the point raised by the Return of the Sheriff, and shown on the face of the petition in this proceeding, that the original petition filed by said Collins on behalf of said prisoner, Millard, made no reference whatever to there hav-

ing been any petition filed in the Superior Court for any Writ of Habeas Corpus, as required by Rule 50 of the Rules of said District Court, of which this Court will take judicial notice, and which reads as follows:

> "Any person applying for a Writ of Habeas Corpus shall furnish with the petition a copy thereof for service upon the party to whom the Writ shall be addressed.
>
> "The petition shall set forth the facts upon which it is claimed that the Writ should be issued. Mere conclusions of law set forth in the petition will be disregarded by the court.
>
> "If a previous application for a Writ of Habeas Corpus has been made in the same matter, to any other court, that fact shall be set forth in the petition and the action of said court upon said petition shall be set forth therein." * * *

We insist that this requirement is jurisdictional, and it was taken advantage of by the allegation in the Return of the Sheriff, which should have the same force as a preliminary objection.

POINT III.

There is no legal merit in the contention of the Appellant Millard that the complaint which was sworn to before Honorable Matthew D. Hartigan, one of the Judges of the Municipal Court of Chicago, and which was the basis for the extradition proceedings challenged in this case, was not sufficient in form and did not state a public offense.

This complaint, a copy of which, duly certified, was offered and received in evidence on the hearing of this matter, follows the language of Paragraph 98 of Chapter 38 of the Criminal Code of the State of Illinois (see Callahan's Illinois Statutes, Vol. 3, p. 2493). This statute is also set out in full in the application of the District Attorney of Cook County, Illinois, for the extradition of said Millard, all of which form a part of the papers acted upon by the Governor of the State of California. It is also quoted, *verbatim,* in the case of Maxwell vs. People, 158 Ill. 248, s. c., 41 N. E. Rep., p. 995, at p. 997, and is as follows:

> "Every person who shall obtain, or attempt to obtain from any other person, or persons, any money or property by means or use of any false or bogus checks, or by any other means, instrument, or device, commonly called 'the confidence game,' shall be imprisoned in the penitentiary not less than one year nor more than ten years."

This statute was expressly held not to be void for uncertainty, in People vs. Bertsche, 265 Ill. 272, in which it was also held that the fact that the swindling scheme took the form of a business transaction was not material and was not a defense. It was also so considered in Graham vs. People, 181 Ill. 477, s. c., 47 L. R. A. 731; People vs. Clark, 256 Ill. 14; People vs. Brady, 272 Ill. 401.

In the Maxwell case, the Supreme Court of Illinois said, quoting from Morton vs. The People, 47 Ill. 468:

"As these devices are as various as the mind of man is suggestive, it would be impossible for the legislature to define them, and equally so to specify them in an indictment; therefore the legislature has declared that an indictment for this offense shall be sufficient if the allegation is contained in it that the accused did, at a certain time and place, unlawfully and feloniously obtain, or attempt to obtain, the money or property of another by means and by use of the 'confidence game,' leaving it to be made out by the proof the nature and kind of the devices to which resort was had."

As stated in the foregoing cases, the section immediately following Paragraph 98, viz.: Section, or Paragraph 99 of the Illinois Criminal Code (See Chapter 38, Sec. 231, Vol. 3, Callahan's Illinois Statutes, p. 2498), states that an allegation of the commission of this offense known as "the confidence game" shall be deemed sufficient if it follows the language of the statute, and so all these Illinois cases hold. It seems unnecessary to make any further argument on this point.

POINT IV.

On the hearing before the District Court, the Petitioner there contended, and makes the claim here, that the said complaint was not sworn to before a magistrate, and his petition for the Writ of Habeas Corpus herein so alleges. This is utterly fallacious.

On the hearing, as shown by the Statement of Facts hereinbefore made, the Respondent-Sheriff put in evidence, and there was received in evidence without objection, copies of the Statutes of the State of Illinois, to wit, Section 389 of Chapter 37 of the Criminal Code of the State of Illinois, Section 390 of Chapter 37 of said Code, and Section 442 of Chapter 37 of that Code, which provide that the Municipal Court of the City of Chicago shall be a COURT OF RECORD, and shall have jurisdiction in all proceedings for the arrest, examination, commitment and bail, of persons charged with criminal offenses, and that the practise in all proceedings in that court for the arrest, examination, commitment and bail, of persons charged with criminal offenses shall be the same, as near as may be provided by law, for similar proceedings before justices of the courts of record and justices of the peace, with the following exceptions: 1. The complaint shall be filed with the Clerk of the Municipal Court who, when ordered by the Court, shall issue a warrant; and also Section 686 of Chapter 38 of said Code, which gives the Municipal Court jurisdiction and power to issue warrants for the apprehension of persons charged with offenses, except as such as are cognizable exclusively by justices of the peace, and any judge of a court of record, in vacation as well as in term time, or any justices of the peace are authorized to issue process, etc.

In this case the extradition papers showed that the complaint sworn to before one Matthew D.

Hartigan, who was certified to by the Governor of Illinois as being a judge of the Municipal Court, and the warrant was issued by the Court itself and witnessed by the Clerk of the Court. All of these papers were certified to as genuine and authenticated by the Governor of Illinois, and were received and accepted as such by the Governor of the State of California.

For this reason, if for no other, they must be so taken and accepted by any court on habeas corpus proceedings.

A multitude of authorities could be cited in support of this contention, but it should be enough for our purposes to cite the case of Compton vs. Alabama, 214 U. S. 1, which is quoted by this court and followed in the recently decided case of Glass, Appellant, vs. Becker, Sheriff, et al., Appellees, No. 5259, opinion filed April 16th, 1928, not yet reported in the Federal Reports, as follows:

> "When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective states concerned as a sufficient basis in law for their acting—the one in making the requisition, the other in issuing a warrant for the arrest of the alleged fugitive—the judiciary should not interfere on habeas corpus and discharge the accused upon technical grounds, unless it be clear that what was done was in plain contravention of law."

This court cites Ex parte Regal, 114 U. S. 642, 652; Tiberg vs. Warren, 192 Fed. 458; In re

Strauss, 125 Fed. 326; Webb vs. Yorke, 79 Fed. 616, 622.

In the case of In re Strauss, 197 U. S. 324, 49 L. Ed. 774, a verified complaint before a magistrate was held to be the equivalent of "an affidavit" within the meaning of the extradition statute. This case also gives the word "charged" in such statute its broadest possible meaning.

In Lott vs. Davis, 264 Ill. 288, the Supreme Court of Illinois construed the constitutional amendment permitting the creation of a Municipal Court of the City of Chicago, and held that the purpose of this amendment was to create a court with the jurisdiction and functions of justices of the peace and police magistrates and to abolish those offices for the territory within the City of Chicago.

In In re Keller, 36 Fed. 681, it was even held that an affidavit which was required by the Federal law to be sworn to before a magistrate was complied with when sworn to before one "J. M.," Clerk of the Municipal Court, it being presumed that it was taken in the court. And see also Grim vs. Shine, 187 U. S. 180; s. c. 47 L. Ed. 130.

POINT V.

The Petitioner on the hearing in the United States District Court called the prisoner Millard as a witness, and offered to prove by him that, inferentially, he was not a fugitive from justice, because, as stated by his counsel, his purpose was "not to bring to trial in this habeas corpus case any issue or question of guilt or innocence, but to

show that no such issue and no such question is possible, and that the accusation itself is false and fraudulent and that it is without reasonable or probable cause, and is in fraud and perversion of the Constitution and laws of the United States relative to interstate rendition." He added the words "that the accused is not a fugitive from justice." Counsel for the Respondent-Sheriff, having in mind the well-established right of a person whose extradition is sought, even after a Rendition Warrant has been issued by the Governor of the demandant state, to show that he was not a fugitive from justice because he was not in the demanding state at the time of the commission of the crime, promptly eliminated that proposition as follows: (R., p. 46.)

> "By Mr. Becker counsel for Respondent-Sheriff: It is understood, I believe, by this offer —to make it perfectly clear on the record— that the Petitioner is not offering to testify or prove that he was not actually in the State of Illinois at the times charged in the complaint and warrant involved in this proceeding, but simply because, as he did not commit any offense and therefore he is not a fugitive. Am I correct?"

to which counsel for the prisoner, Mr. Morris, replied: "Yes." The objection of counsel for the Appellee to the offer of this evidence was then renewed on the same grounds as before; that the matter offered was not a permissible subject for inquiry in this proceeding and must be tried out in

the state courts of Illinois after the Petitioner was brought there to answer. The court below sustained the objection and did not permit the prisoner, Millard, to give the testimony which was offered.

It is impossible to believe that it can be seriously contended here that the District Court was not entirely right in sustaining the objection and making this ruling. The cases in the Federal courts are unanimous on this point. They have recently been collected and cited to this court in the case of Glass, Appellant, vs. Becker, Sheriff, et al., Appellees, 25 Fed. (2d), p. 929. Some of them are Drew vs. Thaw, 235 U. S. 432; Roberts vs. Riley, 116 U. S. 80; Munsey vs. Clough, 196 U. S. 364; Appleyard vs. Mass., 203 U. S. 222; McNichols vs. Pease, 207 U. S. 100; Biddinger vs. The Commissioner of Police, 245 U. S. 128.

Even in removal proceedings from one federal district to another, it has been held that one held for removal for trial for an alleged crime from one Federal district to another, is deprived of no constitutional right by the refusal of the Commissioner to admit the evidence of his innocence. U. S. of America ex rel. Hughes vs. Gault, U. S. Marshal, 271 U. S. 142, 70 L. Ed. 875, which distinguishes the case of Tinsley vs. Treat, 205 U. S. 20, 33, 51 L. Ed. 689, 695, and points out that the statement in Harlan vs. McGourin, 218 U. S. 442, 447, 54 L. Ed. 1101, 1105, that Tinsley vs. Treat held the exclusion of evidence to be the denial of a right secured under the Federal Constitution, is inaccurate.

The motives and purposes of the prisoner in leaving the State of Illinois, after the commission of the crime, cannot be inquired into in habeas corpus proceedings (Bassing vs. Cady, 208 U. S. 386, 394; 52 L. Ed. 543); nor can the motives and purposes of the accuser, or of the state authorities of the demanding state, for bringing him back there be questioned in such a proceeding. Pettibone vs. Nichols, 203 U. S. 222, 51 L. Ed. 161.

CONCLUSION.

Having thus covered, and we believe, effectively answered, all of the contentions which were made and the questions which have been raised below and on this appeal, we respectfully, but earnestly, insist that the most casual examination of the record in this case will disclose, that this appeal is wholly frivolous and unmeritorious, and has patently been taken for the purpose of delaying the removal of the prisoner, Millard, for trial in the state in which he has committed a felonious offense.

Hence, the order of the District Court should be affirmed, and the prisoner remanded to the custody of the Sheriff-Appellee, to be delivered to the State Agent of the State of Illinois, as commanded by the Rendition Warrant of the Governor of this State.

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